UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION15

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| EKHAYA YOUTH PROJECT, INC. | * | |
| and | * | Case 15-CA-155131<br>15-CA-162082 |
| DALANA ZIPPORAH MINOR, an Individual | * | |
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**RESPONDENT'S POST-HEARING MEMORANDUM**

Respondent, Ekhaya Youth Project, Inc. ("EYP"), submits this post-hearing memorandum as requested by the Administrative Law Judge and addresses herein the following issues:

1. Respondent opposes the proposed amendment on the morning of the hearing to amend the Consolidated Complaint to add a charge of unlawful termination of Nicholas Davis and to pray for remedies in connection with that new charge.
2. The General Counsel has failed to demonstrate that the Charging Parties were engaged in any protected concerted activity and/or that the Charging Parties were discharged by Respondent for engaging in any protected concerted activities.
3. Respondent's promulgation and maintenance of its E-Mail/CC Policy is permissible and does not constitute an unfair labor practice.

1. **Respondent opposes the proposed amendment on the morning of the hearing to amend the Consolidated Complaint to add a charge of unlawful termination of Nicholas Davis and to pray for remedies in connection with that new charge.**

The Office of the General Counsel proposed on the morning of the hearing to amend the Consolidated Complaint to add a charge of unlawful termination of Nicholas Davis (a gentleman who has sat on the sidelines since June 23, 2015, when Ms. Minor solicited him and Ms. McGroo to join Ms. Minor's claim, and even after he spoke with Board agents in October 2015, *Tr., p. 286*) and to pray for remedies on his behalf in connection with that new charge.

Respondent objected to the proposed amendment on the grounds that it was untimely under Section 10(b), unjust under Board Rule 102.17, and a denial of procedural due process to require Respondent to defend a new charge with additional monetary exposure "on the fly," so to speak.

The Administrative Law Judge took the motion under advisement and Respondent now further submits on its opposition.

Board Rule 102.17 would seem to permit amendments at any time, but only "on terms that are just." In the case at hand, no just terms were able to be considered and none can now be considered. Basically, Respondent was required to defend without notice and not even a written complaint or an opportunity to plead any special defenses.

The Office of General Counsel submits *Redd-I, Inc.*, 290 NLRB 1115, as support for the proposed amendment on the morning of hearing.

In *Redd-I*, the Board reversed the ALJ to hold that it would have allowed the General Counsel to amend the Complaint at the hearing and litigate as to the discharge of an additional employee even though the additional employee's discharge occurred more than 6 months before

the motion to amend. The Board wrote that Section 10(b) would not be a bar if "the alleged violation appears to be closely related to allegations of that charge [a timely filed charge]." *Id.*, at 1115. Since there was no evidence taken by the ALJ after his denial of the proposed amendment, the Board remanded. Therefore, *Redd-I*, itself, is not instructive as to when a new charge may be sufficiently intertwined with a timely filed charge to be considered "closely related."

In the case at hand, there is simply not enough information as to any protected concerted activity of Ms. Minor or Mr. Davis upon which to approach the 'closely related" question. While not controlling, they were discharged on different dates and for not all together the same reasons.

While the Administrative Law Judge may feel compelled to follow *Redd-I*, consideration should be given as to whether *Redd-I* is supportable in view of *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007). While *Ledbetter* was superseded in part by the *Lily Ledbetter Fair Pay Act*, its legal principles remain controlling.

*Ledbetter* addresses the statute of limitations in Title VII cases which is similar to Section 10(b) under the NLRA. The 6-month trigger under Section 10(b) is "from any unfair labor practice." The 180-day trigger under 42 U.S.C.A. §2000e-5(e)(1) is from "the alleged unlawful employment practice."

The Court in *Ledbetter* held that the time for filing a charge begins when a discrete discriminatory act occurs such as termination, failure to promote, denial of transfer, or refusal to hire.

Under the rationale of *Ledbetter*, Mr. Davis' proposed charge and complaint would be barred by Section 10(b), coming as it does some 10-plus months after his June 22, 2015 discharge, the alleged discrete discriminatory or retaliatory act.

Even if Your Honor limits your consideration to *Redd-I* and deems the charges closely related, Section 10(b) is not the only bar at issue. While many of the Board Rules are one-sided and appear to allow trial by ambush, the Board in *Redd-I* recognized that the Constitutional guarantee of Due Process yet looms over Section 10(b), but was able to avoid an actual determination as to whether the guarantee of procedural due process would permit the amendment to add a new charge and, particularly, a new Charging Party, at the hearing since the ALJ had denied the motion to amend and the Respondent was not forced to defend the new charge at the hearing. This is how the Board got around the due process issue:

> By allowing the complaint amendment, we are remanding the case to the judge. Thus, both parties will *now* have the time to prepare and the opportunity to present their cases. That is all that is *required* to establish procedural due process.

*Id.*, at 1117 (emphasis added), citing *NLRB v. Complas Industries*, 714 F2d 729 (7th Cir. 1983) (found a denial of due process because no adjournment was provided to allow the respondent a meaningful opportunity to meet the amended claim).

Time to prepare and an opportunity to present its case and defenses as to Mr. Davis' case – requirements of procedural due process as recognized by *Redd-I* – were not and cannot now be afforded to Respondent. The motion to amend should be denied.

**2. The General Counsel has failed to demonstrate that the Charging Parties were engaged in any protected concerted activity and/or that the Charging Parties were discharged by Respondent for engaging in any protected concerted activities.**

The General Counsel alleges that Respondent has violated Section 8(a) of the NLRA, 29 U.S.C. §158(a)(1), by disciplining and terminating the employment of Dalana Minor and, if amendment to the Complaint is permitted, Nicholas Davis, because of their exercise of their rights under Section 7 of the Act, 29 U.S.C. §157, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

General Counsel has the burden of proof by a preponderance of the evidence "that the employee was engaged in protected concerted activity, that the employer knew of the activity and its concerted nature, and that the employee's protected activity was a motivating factor prompting some adverse action by the employer." *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 550 (6th Cir. 1993).

The requirements of *protected concerted* activity, as must be demonstrated by General Counsel, are distinct. The Act protects concerted activity, not isolated conduct of a single employee even if taken for the goal of mutual aid or protection. *E.I. Du Pont De Nemours & Co. v. N.L.R.B.*, 707 F.2d 1076 (9th Cir. 1983). The employee "must act with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987). "Purely personal griping does not fall within the scope of protected concerted activity." *Id.*, at 1535.

If the General Counsel establishes that protected concerted activity was a motivating or substantial factor in the employer's decision to terminate the employee, the employer has the burden of coming forward with some evidence to demonstrate that the same action would have taken place in the absence of the protected conduct. *Manimark, supra; N.L.R.B. v. Wright Line,* 662 F.2d 899 (1st Cir. 1981).

In the case at hand, the General Counsel has failed to make a *prima facie* showing to support even the inference that protected concerted activity was a motivating factor in Respondent's decision to terminate the Charging Party. The Charging Party was not engaged in protected concerted activity and Respondent had no knowledge of any protected activity and its concerted nature. The record does not demonstrate that protected concerted activity was a

motivating or substantial factor in Respondent's decision to terminate the employment of the Charging Party. The record clearly and overwhelmingly demonstrates that the actual and motivating factors for the termination of the Charging Party were, in the case of Ms. Minor, gossiping about the sexual orientation of Respondent's COO, disclosing confidential personnel information, sleeping at her desk, and boisterous conduct, and, in the case of Mr. Davis, gossiping about the sexual orientation of Respondent's senior management and failing to satisfy Respondent with respect to his pending criminal charges.

The original charge in this case does not even allege any concerted activity; it merely alleges generically that the Charging Party was discharged in retaliation for her "protected concerted activities." *Exhibit GC 1(a).*

Mr. Davis did not identify any protected concerted activity in which he was engaged. The only causes for his termination which he could identify at trial were the text messages with Ms. Minor about the alleged sexual orientation of Respondent's COO, the failure to satisfy Respondent regarding the pending criminal charges against him, and "for having a matter of opinion and not being willing to be submissive to the Kool Aid drinking." *Tr., p. 297.*

The only activity that the General Counsel and Ms. Minor can point to as alleged protected concerted activity of which Respondent would have had any knowledge are the text messages between Ms. Minor and Mr. Davis. *Exhibit GC 10.5 – 10.11.* However, gossip about the perceived sexual orientation of management and the erroneous perception of a problem between the COO and an employee are not protected concerted activity.

Respondent is genuinely at a loss to respond because there is simply no evidence of concerted activity by Ms. Minor and/or Mr. Davis which was undertaken for the mutual aid or

protection of employees of Respondent. While Your Honor attempted to focus the parties on the text messages (*Tr. p. 203*), there is simply no protected activity being conducted in the text messages.

Section 7 of the Act provides that an activity, to be protected, must be "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. There is no suggestion by General Counsel that any activity of the Charging Party was for the purpose of collective bargaining. The "mutual aid or protection" clause of Section 7 protects employees who "seek to improve terms and conditions of employment." *New River Industries, Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991).

The text messages did not constitute "protected concerted activity" within the meaning of Section 7 of the Act because they did not relate to "terms and conditions of employment" but were inappropriate gossiping and mere personal griping about Respondent's COO. The "expression of criticism about management . . . is not a condition of employment that employees have a protected right to seek to improve." *New River Industries, Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991). Even where "employees collaborate to criticize matters that are not related to mutual aid or protection of the employees; this activity is not 'protected concerted activity.'" *Id.* at 1295; *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F.2d 749, 751 (4th Cir. 1949). *See also, Media Gen. Op. v. N.L.R.B.*, 560 F.3d 181, 189 (4th Cir. 2009) (an "opprobrious ad hominem attack on a supervisor" was unprotected by the Act).

At most, the Charging Party was just "venting" and perhaps motivated by frustration in the texting. Such conduct does not rise to the level of concerted activity for mutual protection. *Pub. Ser. Credit Union.* 39 N.L.R.B. AMR 33 (2011). "Purely personal griping does not fall

within the scope of protected concerted activity." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1535 (11th Cir. 1987).

The employee "must act with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987). The Charging Party did not act on authority of other employees in texting nor did she bring any group complaints to Respondent's attention or intend to induce or prepare for group action.

In regard to the Charging Party's disclosure of confidential personnel information (salary information), that, certainly, was not joined in by other employees and was vehemently objected to by other employees. *Tr. pp. 248, 256, 308-11. Exhibits GC 12, 13, 14, and 15.* The Board has previously held that a Charging Party's communications were not drafted with or on the authority of other employees where, as here, the Charging Party's fellow employees found the communications "inappropriate and reported them to the manager." *Miami Jewish Health System*, 39 N.L.R.B. AMR 41 (2011); *Intermountain Spec. Abuse Treatment Ctr.*, 39 N.L.R.B. AMR 39 (2011).

The reason that the search of the record for protected activity which might have been the motivating factor for the discharge of the Charging Parties is not productive is that the actual and only reasons for their discharge are abundantly clear. Even if the General Counsel is able to articulate in Brief any arguably protected concerted activity which allegedly had something to do with Respondent's decision to terminate the Charging Party, which is denied, the record as a whole demonstrates the actual reasons for discharge and that the same action would have taken

place in the absence of any protected concerted activity which General Counsel may be able to posit from the record.

The Supreme Court of the United States has expressly recognized that "the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *N.L.R.B. v. Local Union No. 1229, Int'l Broth. Of Elec. Workers*, 346 U.S. 474 (1953). It is well settled that "the courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty." *Id.* Courts have held that when an employee "attacks" his or her employer, the attack will deprive the employee of Section 7's protection if it constitutes "insubordination, disobedience or disloyalty," which the Court made clear, is "adequate cause for discharge." *Id.* at 475; *Endicott Interconnect Tech., Inc. v. N.L.R.B.*, 453 F.3d 532, 537 (D.C. Cir. 2006) ("Section 7 of the Act . . . does not override the employer's authority to discharge for cause under Section 10(c) of the Act, which expressly provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been . . . discharged, or the payment to him of any backpay, if such individual was . . . discharged for cause."); *George A. Hormel Co. v. N.L.R.B.*, 962 F.2d 1061, 1064 (D.C. Cir. 1992) ("Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty.")

Ms. Minor, in her grievance letter after being placed on administrative leave, clearly recognizes that the driving force of her discipline is the hurtful gossip in which she engaged about the perceived sexual orientation of Respondent's COO. *Exhibit EYP-4.*

As set out above, Mr. Davis clearly recognized that the causes for his termination were the offensive text messages with Ms. Minor about the alleged sexual orientation of Respondent's

COO and the failure to satisfy Respondent regarding the pending criminal charges against him. *Tr., p. 297.*

Mr. VanShawn Branch, EYP's Chief Operating Officer, oversaw the termination of Ms. Minor and Mr. Davis. *Tr. pp. 47 and 48.* Mr. Branch identified Exhibit GC 9.1 as the Discipline Documentation Notice relative to Ms. Minor and testified that it describes the reasons for his decision to terminate Ms. Minor. *Tr. p. 50.*

In regard to Ms. Minor's sleeping at her desk, supported by the testimony of Vanessa Sumler, EYP's Claims Manager (*Tr. 241-42*) and the internal investigation of EYP's Corporate Compliance Officer, Nora Rowan (*Tr. pp. 319-20*), Mr. Branch testified that as a standalone incident this conduct would not have resulted in Ms. Minor's termination. *Tr. p. 368.*

In regard to Ms. Minor's talking in a loud and disruptive manner, supported by the testimony of both Mr. Branch and Ms. Rowan as to their personal knowledge (*Tr. pp. 51 and 120*), Mr. Branch also acknowledged that as standalone conduct this would not have resulted in Ms. Minor's termination. *Tr. p. 369.*

No, the weight of all of the testimony clearly shows that Ms. Minor was discharged for her inappropriate and offensive gossiping about the sexual orientation of the COO and for disclosing confidential personnel and salary information without the permission of the employees in question.

Ms. Rowan, the Corporate Compliance Officer, conducted an internal investigation which resulted in her recommendation for termination of Ms. Minor. *Exhibit GC-15.* She testified that Ms. Frazier, QA QI Specialist, was interviewed and was upset that Ms. Minor had obtained Ms. Frazier's salary information only by reviewing payroll information in the course of

an assignment and shared Ms. Frazier's information and the information of Hannah McNally and Kanedra Graves with other employees. *Tr. pp. 308-10.* Ms. Rowan also spoke with Mr. Branch about the texts between Ms. Minor and Mr. Davis (*Tr. pp. 314-18*) and found that they involved inappropriate and misinformed gossip. Exhibit GC-15. Based upon her investigation, as described in Exhibit GC 15, Ms. Rowan recommended that Ms. Minor's employment be terminated. *Tr. p. 321.*

Mr. Branch confirmed that he made the decision to terminate Ms. Minor's employment. *Tr. p. 365.* He stated that his decision was based in part on Ms. Rowan's investigation but also upon his discussions with Ms. Minor. *Tr. p. 366.* Mr. Branch testified that Ms. Minor confessed to him her inappropriate gossiping. *Tr. P. 374.*

Mr. Branch testified that on June 18, 2015, he was forced to leave a training that he was conducting in Houma, Louisiana, because of e-mails that he was receiving about problems being caused by Ms. Minor. *Tr. p. 370.*

On the drive back, Mr. Branch stated that he received a call from Kanedra Graves, who told him that Ms. Minor was disclosing in the office a conversation she was engaging in with Nicholas Davis by text messages concerning Mr. Branch's sexual orientation. *Tr. p. 371.* Ms. Graves then e-mailed to Mr. Branch a statement as to what she had just told him. *Tr. p. 372. Exhibit EYP-7.* Mr. Branch further testified that he found this gossiping about the sexual orientation of management by Ms. Minor and Mr. Davis offensive and disruptive to the office operations because everyone began to talk about it. *Tr. p. 375.*

Mr. Branch also testified that he oversaw the discharge of Nicholas Davis on June 22, 2015. *Tr. p. 357.* He stated that he was personally offended by this inappropriate gossip in which

Mr. Davis participated as to Mr. Branch allegedly hating a certain staff member and wanting to be like that other staff member who is female. *Tr. 362-63.* As Mr. Davis testified, the CEO was upset "that this cancer would start from somebody so close to him," that "he doesn't' understand why people were to slander him or his name." and that his sexual orientation "was not up for discussion for employees." *Tr. p. 277.*

Mr. Branch confirmed that Mr. Davis was also terminated because he failed to provide adequate documentation required by the Louisiana Office of Behavioral Health as to the criminal charges pending against him. *Tr. p. 358.* As Mr. Branch explained, not all criminal charges or convictions preclude employment at EYP, but the State Office of Behavioral Health, as a condition of EYP's provider certification, requires documentation on file as to any convictions or pending charges. *Tr. p. 359.* Mr. Branch correctly testified that a letter from a paralegal (or even an attorney) that "the charges would not affect employment" does not suffice; OBH requires documentation as to the actual charges. *Tr. p. 360.*

It is undisputed that the employment of Ms. Minor and Mr. Davis was "at-will" of EYP. EYP could have discharged these two employees for no reason, and, certainly, for the reasons given. There is nothing in the Act which prohibits termination of Ms. Minor and Mr. Davis for the reasons given and the record as a whole does not in any way suggest that the reasons given were a pretext to circumvent the prohibitions of the Act. Moreover, this issue should not even be reached because the General Counsel has not even made out a *prima facie* case that protected concerted activity was a motivating factor in Respondent's decision to terminate the employment of Ms. Minor and Mr. Davis. The Complaint should be dismissed.

**3. Respondent's promulgation and maintenance of its E-Mail/CC Policy is permissible and does not constitute an unfair labor practice.**

The Complaint alleges that Respondent promulgated its email policies to discourage employees from engaging in protected concerted activity. The only testimony on this issue from the Charging Party was that the email policy "potentially" had something to do with her termination because she complained about it. *Tr. p. 231.* There is absolutely no evidence that the email policy had anything to do with the termination of the Charging Party, only speculation by the Charging Party.

The Email Policies of Respondent that are in question are found at GC-6 and GC-16.

GC-6, promulgated on June 18, 2015, provides as follows:

> Any emails forwarded and replied to by any Central Office Staff member must be carbon copied to the COO. Please be sure to follow the policy and procedure listed in this email. This policy is effective Thursday, June 18, 2015.
>
> In the event the email did not include the COO, please be sure to include the COO when replying. Responsiveness is required during the hours of 9 am – 6 pm and the promise to communicate will be exemplified via operation of the policy stated in this email.

EYP Central Staff employees understood that EYP's e-mail cc policy applied to e-mail which is to be conducted and is conducted on EYP's e-mail system. As the Charging Party explained, emails are sent through the internal EYP email system and the email addresses belong to EYP; they are not the personal email addresses of EYP employees. The Charging Party understood that EYP has a right to access the work emails and check them at any time through the host network. *Tr., p. 169.*

EYP's COO, Mr. Branch, explained that EYP maintains its own email account system with email addresses available to employees for the following purpose:

> The purpose and intent of this policy was so that I could identify the communications that were occurring internally and externally so I could identify the completion of tasks by staff persons and if possible prevent any miscommunication from occurring. Ms. Minor testified yesterday to contacting individuals for liability insurance, but we actually almost lost that coverage due to Ms. Minor along with several other business matters that she was tasked to conduct but did not conduct them as thoroughly as I directed.

*Tr., p. 382.*

The Email Policy was revised effective December 18, 2015, to provide as follows:

> The performance of your duties as an EYP Corporate Office employee which is conducted by e-mail must be conducted using EYP's e-mail system (ekhayafso.org and or your Ekhaya gmail account [first initial, last name eyp@gmail.com]) and not your personal e-mail. All e-mail which is sent by you and/or which is replied to or forwarded by you using EYP's e-mail system must be copied to the COO; in the event that an original e-mail is received by you on EYP's e-mail system and the COO is not copied, you must forward a copy of that e-mail to the COO and copy the COO with any response on EYP's e-mail system. Responsiveness is required during the hours of 9:00 a.m. - 6:00 p.m. and the promise to communicate will be exemplified via operation of the policy stated in this e-mail. The policy outlined in this e-mail ensures 'continued communication' throughout the daily operations of the organization. For Ekhaya Youth Project, this policy is named the Continued Communication Policy and carbon copied or cc is the alternate descriptive. This policy is effective the date of this e-mail.

*GC-16; Tr., p. 383.*

EYP's Email/CC Policy does not infringe upon any employee protections under the Act.

*Guard Publishing Company d/b/a/ The Registered Guard,* 351 NLRB No. 70, correctly recognized that employees have no protected interest in the employer's e-mail system. It would seem to be an absurdity to hold that an employee has a protected interest in the employer's property.

Yet, it must be recognized that the Board in *Purple Communications, Inc.*, 361 NLRB 126, ostensibly overruled *Guard Publishing,* but with limitations and uncertainty as to what exactly may now be required.

It must also be recognized that *Purple Communications* is back before the Board after remand and a decision has not yet been rendered. Given what is perceived as the terribly flawed analysis of *Purple Communications I* and its wide reaching effects, it may be reasonably anticipated that this case will meet with further appeals. Hence, we do not yet have a final and definitive judgment in *Purple Communications*.

Moreover, *Purple Communications*, even as that decision stands today, has no real bearing on the allegation in this case. *Purple Communications* merely held that employee use of the employer's email system for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.

EYP's policy at issue does not ban employee use of EYP's email system for statutorily protected communications on either working time or nonworking time. It merely requires that EYP's Corporate Office employees perform their duties which require email on EYP's email system and that the Chief Operating Officer be copied with all such email on EYP's email system so that performance and productivity may be monitored and so that continuity of communications may be maintained.

Although employees may have a right, after *Purple Communications* reaches a final and definitive conclusion, to use an employer's email system for statutorily protected communications on nonworking times, Counsel has found no ruling which holds that an

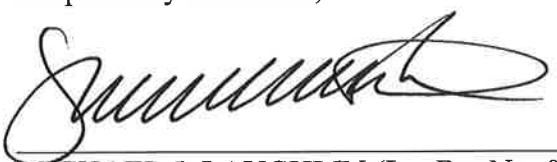
employee has a *privacy* right within the employer's email system. Conducting statutorily protected activities on the employer's email system should be viewed as bulletin board employee postings on the employer's business premises. Just as the employer cannot be barred from its business premises so as not to see postings, an employer cannot be barred from its own email system and the employer has a legitimate need to monitor traffic over its email system. For privacy, it is not unreasonable to require that employees resort to the many available free and easy-to-install personal email accounts.

EYP's email policy is not unlawful.

## CONCLUSION

For the above and foregoing reasons, Respondent, Ekhaya Youth Project, Inc., respectfully prays that the motion to amend the Complaint to add charges and a request for remedies by Nicholas Davis be denied, and that the Consolidated Complaint of Ms. Minor and, if the motion of Mr. Davis is granted, that of Mr. Davis be dismissed with prejudice and for all other general and equitable relief to which Respondent is entitled.

Respectfully submitted,



Dated: July 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Respondent's Post-Hearing Memorandum was filed electronically through the Agency's website on July 7, 2016, which shall constitute service upon the Regional Office, and that a copy has not been served upon Counsel for the General Counsel this same date by e-mail.

MICHAEL J. LAUGHLIN